Supreme Court of the United States

October Term, 1944.

No. 487.

JOSEPH T. WATERS,

Petitioner,

AGAINST

KINGS COUNTY TRUST COMPANY,

Respondent.

PETITION FOR REHEARING.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph T. Waters, pursuant to Rule 33 of this court, respectfully submits this, his petition for rehearing of his application for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit in the above entitled matter, and for the vacating of the order entered on November 6th, 1944, denying said application.

Basis for the Petition for Rehearing.

This petition is made in view of an apparent conflict between the decision of the Circuit Court sought to be reviewed (now reported at 144 F. 2d, 680) and two recent decisions, which had not come to the attention of the petitioner until after the denial of the application for a writ, to wit: *New York Life Insurance Co.* v. *Taylor* (App. D. C.) 143 F. 2d, 14, 17, and *Schmeller* v. *United States,* 6 Cir., 143 F. 2d, 544, 550.

These cases are reported in the Advance Sheets issued respectively under date of August 14th and August 28th, 1944. The ruling in both cases is contrary to the ruling made below in the interpretation of 28 USCA, §695. This application, therefore, is deemed to come within the principle governing such applications, discussed in *R. Simpson & Co.* v. *Commissioner,* 321 U. S. 225, 229.

The Question Presented.

The only question argued on this application is Question No. 1 of the original petition, viz:

Was Defendant's Exhibit A properly admissible as a business record, pursuant to 28 USCA, §695, and if so, does that necessarily make all entries therein admissible, even though they are hearsay, irrelevant and incompetent?

Defendant's Exhibit A (R. 318-345) consisted of separate typewritten sheets, kept in a folder of the estate whose stock was being sold, and it was supposed to be a daily record (R. 161, 202). In form it was like a diary in narrative style, kept by Mr. Lambrecht, the man in charge of the estate, and by Mr. Allen, the Bank's vice-president. This diary, as the petitioner pointed out in the petition and brief, was highly prejudicial to the petitioner's claim that he was employed by the Bank as broker to sell the stock.

As to the claimed employment, the court below ruled that "there was plainly an issue of fact as to whether or not the plaintiff was employed * * *" (R. 352; 144 F. 2d, 681). It is petitioner's contention that the admission of this diary in evidence was highly prejudicial on this issue, and that it was inadmissible on the grounds stated at the time it was offered in evidence, to wit, as containing self-serving declarations (R. 146); and as containing records as to transactions which occurred when the plaintiff

was not present and other transactions which are wholly irrelevant and incompetent (R. 148).

There is no intention to repeat here all the facts fully set forth in the original petition and brief, but for the convenience of the court there are here repeated the two entries made in this diary which are claimed to have been particularly prejudicial to the plaintiff's contentions:

First, attention is called to the entry of March 5th, 1941, made, presumably, after Mr. Lambrecht and Mr. Allen consulted the Bank's attorneys, Messrs. Schmid and Tobias, with reference to a possible liability to petitioner if a sale of the stock were made to one Sanders, the ultimate purchaser, instead of to Newtown Creek Towing & Transportation Company, the petitioner's customer; or in other words, after the thought had entered the minds of both Lambrecht and Allen that the petitioner might have a legal claim to commissions. When that entry was about to be read to the jury (the court having previously overruled at R. 146, 148, the objections above referred to), the court's particular attention was called to the objectionable character thereof; but the court nevertheless, over exception, allowed it to be read (R. 149). That entry reads as follows:

> "Mar. 5. Mr. Allen, Mr. Schmid, Mr. Tobias and Mr. Lambrecht met today and discussed the possible effect of the offers of Newtown Creek Towing Company and Mr. Sanders for the Red Star and College Point companies and our liability with respect to commissions and the payment of bonus to employees, etc. At the conclusion of the conference, Messrs. Wrenn & Schmid advised that, in their opinion, they believe the executors may reject the offer of the Newtown Creek Towing Company and accept the offer of Mr. Sanders without incurring any liability for brokerage to the broker who represented the

> Newtown Creek Towing Company. This advice was given after reading our correspondence on the matter and detailed oral report of Mr. Allen and Mr. Lambrecht."

The entry of March 6th (R. 339) refers to a conversation which allegedly occurred with petitioner's then attorney, Mr. Ives, and is equally prejudicial on the issue as to petitioner's employment. It reads as follows:

> "I reiterated we had not engaged anybody to negotiate a sale of our stock of the Red Star and College Point companies, and that from the very beginning, I had so indicated to Mr. Waters, and that he represents the buyer and not the Trust Company *et al.* as agent, broker or otherwise."

The court below, in sustaining the admissibility of the record, placed it flatly on the ground that it was allowable under the Business Records Act, and that, in the court's opinion,

> "the business of a corporate trustee justified the establishment of a practice of keeping detailed records of day by day events affecting its trusts, and that records so made are made 'in the regular course of business'" (R. 356).

As pointed out in petitioner's brief, this diary was admittedly inaccurate (R. 157-159, 168) and incomplete (R. 157, 209, 232-233). The person who kept the record was not obliged, as part of his duties, to record everything that occurred in the handling of the estate's matters. According to Allen, it was obligatory only that "certain definite things" go in, "such as the submission of an accounting to the court, and an agreement from a co-trustee or any other beneficiary as to the sale or purchase of im-

portant security. Those things must go in. Then as to all of the other things, the man who is in charge of the account puts in those things which are important * * * but he boils down the important things. Some men are more careful than others * * *. It would be a man's discretion as to what he would write down * * * " (R. 232-233).

The Conflicting Decisions.

In view of these facts, and what was said about them in Point I of the petitioner's brief, there is marked agreement with petitioner's contentions in the two recent decisions already referred to; and by the same token, marked disagreement with the opinion of the court below. Thus, in *New York Life Insurance Co.* v. *Taylor,* 143 F. 2d 14, 17, it was held that a hospital record containing reports of conversations with the assured on a life insurance policy, and opinions of people treating him, were inadmissible under the statute, as interpreted by this court in *Palmer* v. *Hoffman,* 318 U. S. 109, Justice Arnold saying, at page 17:

> "A literal reading of the above statute would make the records in this case admissible on the theory that the business of operating a hospital requires records of the histories of patients, reports of unusual conduct and also diagnoses by physicians. But the Supreme Court, in *Palmer* v. *Hoffman,* has, we believe, limited the admission of records under the Federal Shop Book Rule statute to those which are trustworthy because they represent written reflections of day to day operations. The opinion in that case holds that the statute is not one 'which opens wide the door to avoidance of cross-examination'.
>
> "In this case the records are not offered to prove written facts such as the date of admission to the

hospital, the names of the attending physicians, etc. They are offered to prove the truth of accounts of events and of complicated medical and psychiatric diagnoses. The accuracy of such accounts is affected by bias, judgment and memory; they are not the written product of an efficient clerical system. There is here lacking any internal check on the reliability of the records in this respect, such as that provided for 'payrolls, accounts receivable, accounts payable, bills of lading and the like'. The Supreme Court has stated that the test of admissibility must be the 'character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation'. *To admit a narrative report of an event, or a conversation, or a diagnosis, as a substitute for oral testimony, is to give any large organization the right to use self-serving statements without the important test of cross-examination.* Cross-examination is unimportant in a case of systematic routine entries made by a large organization where skill of observation or judgment is not a factor. We believe that *Palmer* v. *Hoffman* restricts the application of the Federal Shop Book Rule statute to that type of business entries." (Emphasis supplied.)

Chief Justice Groner concurred in this opinion, but Justice Egerton dissented, on the ground that in his opinion, the records were admissible under the statute.

In *Schmeller* v. *United States,* 143 F. 2d 544, the Sixth Circuit had before it the question as to the admissibility of a group of documents made in the regular course of business, some of which contained hearsay statements. The court said, per Allen, *J.*, at page 550:

"As to certain of these documents, we think that this admission *en masse* was error. The purpose

> of the enactment of section 695 was to eliminate the technical requirement of proving the authenticity of business records and memoranda by the testimony of the maker (*Landay* v. *United States*, 108 F. 2d 698, 705). *The mere fact that the paper offered in evidence is taken from a business file and is otherwise proved in compliance with §695 does not establish its competency.* It is questionable whether all the papers offered in evidence with this mass of exhibits were made as memoranda or records. It is also questionable whether all of the matters to which they related were relevant. *Section 695 in no way repealed the ordinary requirements of relevancy and competency.. The District Court should have examined and ruled upon each paper separately, and should have excluded the hearsay and other incompetent evidence.''* (Emphasis supplied.)

In the case at bar, although the question was fully argued below, to the effect that even if the record was admissible as such, the entries in question were irrelevant and incompetent, the court never discussed the question in its opinion, and it must be deemed to have been overruled. As was pointed out in petitioner's brief, even if Mr. Lambrecht had been interrogated as to the advice of counsel, any evidence on this subject would have been inadmissible as hearsay and highly irrelevant and prejudicial, for such advice is never a defense in a civil action, except where want of probable cause is an essential part of the cause of action; and even then it is only admissible when it is first proved, as it was not attempted to be proved here, that the advice was given after a full and fair statement of the facts (38 C. J. 427, *et seq.;* 18 R. C. L. 45, *et seq.; Lathrop* v. *Mathers,* 143 App. Div. 376, 380).

It was argued in the respondent's brief that Lambrecht was examined as a witness, and could therefore have been

cross-examined as to these entries. Even if true, that is not an answer to the objection that the entries themselves were hearsay, irrelevant and incompetent. Otherwise, all hearsay evidence is admissible, merely because the witness testifying to it can be cross-examined as to what he heard. Nor is it true that Lambrecht could have been cross-examined as to the advice of counsel, who themselves were not produced as witnesses. Moreover, it is of course the law that witnesses cannot corroborate their own testimony by self-serving documents, prepared by themselves. If they can, then the door is open to the use of such documents in any case, and the witness with the most plausibly written memorandum in support of his testimony will be the one entitled to the greatest belief.

The decision of the court below, without any basis in the record, has held that the business of a corporate trustee justifies the establishment of the practice of keeping such a diary. As already stated, the only evidence in the record is to the effect that only certain essential matters were required to be kept in record form, and the rest—the decision as to what was important enough to put in and how to boil it down—was left wholly to the discretion of the man in charge. Yet the matters here in question were none of them of the essential character which required a record to be kept. They were matters left to the discretion of the entrant, and as stated by Justice Arnold in the *New York Life Insurance Co.* case, they were a mere "narrative report of an event", whose admission gives to "any large organization the right to use self-serving statements without the important test of cross-examination." As also stated by Judge Arnold, in the same opinion, "The accuracy of such accounts is affected by bias, judgment and memory."

The entries in the case at bar were made by the very two men charged with responsibility in the transaction, who were admittedly anxious to sell to the ultimate customer,

Sanders, rather than to the petitioner's customer, and heavily charged with bias.

In answer to the petition, the respondent reiterated the argument that the door had been opened to the use of Exhibit A by petitioner's placing in evidence Exhibit 12; but the Circuit Court deliberately refrained from ruling on this question, because it held that it was "disposed to agree with the ruling that it was admissible under the statute" (R. 356). However, the contention is without merit, because Exhibit 12 is not even a part of Exhibit A, but an entirely separate and distinct paper (R. 295), and was only printed as part of Exhibit A because a copy thereof, with marginal notes, was kept in the file with the rest of the papers making up Exhibit A (R. 326-327), which was not offered or received as explaining Exhibit 12 (R. 146), and could not possibly have served that purpose, particularly when it is borne in mind that Exhibit 12 is dated February 18th, and the entries to which particular objection was made are dated March 5th and March 6th, and further, they relate to entirely different subjects. If it had been offered to explain Exhibit 12, then the court could only have admitted that part which was explanatory, and that only for the purpose of construing Exhibit 12; not as independent evidence (*People* v. *Schlessel*, 196 N. Y. 476, 481; 7 Wigmore, *Evidence*, §2113).

Conclusion.

The question sought to be reviewed is one of the highest public importance. There seems to be a great differerence of opinion as to what this court meant in interpreting the Federal Shop Book Statute in the case of *Palmer* v. *Hoffman*. It is a question of almost daily recurrence in the trial of lawsuits, and a question that should be settled once and for all. It seems, in the case at bar,

as if great injustice has been done to the petitioner by the admission of a record which he had every right to believe was a self-serving document, containing hearsay, irrelevant and incompetent entries, which plainly affected the very issue which the jury was asked to pass upon, namely, that of the plaintiff's employment.

The decision of the court below, without any basis therefor in the record, discriminates in favor of corporate trustees, and gives them the right, denied to other litigants, to prepare a narrative record of events and transactions, leaning definitely in their own favor, after litigation has become imminent, and to introduce such record in evidence in defense of the position which they seek to bolster.

In view of the conflicting opinions which now appear to be held by the Circuit Court of Appeals of the Sixth Circuit, and by the Court of Appeals for the District of Columbia, the present seems a proper occasion for the granting of an application for rehearing.

WHEREFORE petitioner prays that a rehearing be granted; that the order denying the original petition be vacated, and that the writ issue as heretofore prayed.

Dated, New York, November 30th, 1944.

Respectfully submitted,

SIDNEY S. BOBBÉ
Attorney for Petitioner.

I hereby certify that this petition for rehearing is presented in good faith, and not for delay.

SIDNEY S. BOBBÉ,
Attorney for Petitioner.